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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. [redacted]

MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRED L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico and His Successors in Office; THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; and THE STATE OF NEW MEXICO,

Respondents.

Motion for Leave to File Brief of Amicus Curiae and Brief of Amicus Curiae in Support of a Petition For a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

KURT W. MELCHIOR
One Embarcadero Center, 25th Floor
San Francisco, California 94111
Attorney for Amicus Curiae, Navajo Forest Products Industries, an Enterprise of the Navajo Tribe

Of Counsel:
JAN T. CHILTON
SEVERSON, WERSON, BERKE & MELCHIOR
One Embarcadero Center, 25th Floor
San Francisco, California 94111

GEORGE J. AHLMANN
AHLMANN & SIGLER
P.O. Box 1279
Navajo, New Mexico 87328

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Respondents.

Motion for Leave to File Brief of Amicus Curiae

Navajo Forest Products Industries, an enterprise of the Navajo Tribe, moves for leave to file the attached Brief of Amicus Curiae in support of the petition for certiorari. Petitioner's attorney has consented to the filing of this amicus brief. Respondent's attorney has refused because "this is war and he wants no help for the Petitioner."

Navajo Forest Products Industries' interest in this case arises from the fact that it is a party to a case raising the same issue, namely, whether the New Mexico gross receipts tax may constitutionally be imposed on the value of services performed by contractors engaged in creating improvements for an Indian tribal enterprise located on the reservation, where the tribal enterprise is developed and closely regulated by the federal government pursuant to the long-

standing congressional policy of promoting economic improvement and self-sufficiency for Indian tribes on reservations. *Navajo Forest Products Industries v. O'Cheskey,* No. 78-432 (D.N.M.). Amicus' case has been stayed by District Judge Campos pending a final decision of this appeal.

This case was heard by the Court of Appeals for the Tenth Circuit *en banc.* Its opinion upholding the tax was delivered on June 5, 1980. On June 27, 1980, this Court decided *White Mountain Apache Tribe v. Bracker,* .... U.S. ...., 100 S.Ct. 2578 and *Central Machinery Co. v. Arizona State Tax Comm'n,* .... U.S. ...., 100 S.Ct. 2592, striking down, as federally preempted, similar Arizona fuel excise and gross receipts taxes imposed on contractors dealing with Indian tribal entities. These cases were called to the Court of Appeals' attention, and a rehearing was granted. However, in the briefest of opinions, the Court of Appeals adhered to its prior decision, wholly disregarding both the holdings and the reasoning of this Court's decisions at the end of the last term.

In its petition for certiorari, the Mescalero Apache Tribe has concentrated on the federal assistance to its project and on the fact that the court below failed properly to consider the standards of preemption announced by this Court.

Amicus desires to make the following additional arguments: First, contrary to its assertions on rehearing, the Court of Appeals applied a test of taxability long superseded by this Court's decisions. Second, the Court of Appeals failed to consider the tests this Court has adopted for determining claims of preemption of state taxes on Indian tribal-connected activities. Third, the decision below will control questions of state taxation for Indian tribes and tribal-related contractors throughout the Rocky Mountain states where many tribes are located. Those tribes, like tribes in other circuits, have a right to the equal application

of this Court's decisions. For that reason as well as to uphold the rule that this Court's opinions are controlling on all lower courts, the decision below may not stand. Fourth, the issues are so clear and the outcome of the case so completely controlled by this Court's latest decisions that summary reversal is appropriate. This Court's time need not be further taken to redecide an issue already resolved by its recent decisions.

For all of these reasons, Amicus Curiae respectfully requests that the motion for leave to file its brief in support of petition for certiorari be granted, that certiorari be granted in this case, and the decision below be summarily reversed.

Respectfully submitted,

KURT W. MELCHIOR
One Embarcadero Center, 25th Floor
San Francisco, California 94111
Telephone: (415) 398-3344
Attorney for Amicus Curiae, Navajo Forest Products Industries, an Enterprise of the Navajo Tribe

Of Counsel:

JAN T. CHILTON
SEVERSON, WERSON, BERKE & MELCHIOR
One Embarcadero Center, 25th Floor
San Francisco, California 94111
Telephone: (415) 398-3344

GEORGE J. AHLMANN
AHLMANN & SIGLER
P.O. Box 1279
Navajo, New Mexico 87328
Telephone: (505) 777-2262

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Respondents.

Brief of Amicus Curiae in Support of Petition for a Writ of Certiorari to The Tenth Circuit Court of Appeals

Amicus Curiae, Navajo Forest Products Industries ("NFPI"), respectfully submits this brief in support of the Mescalero Apache Tribe's petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

I.
SUMMARY OF ARGUMENT

In its *en banc* decision below, the Court of Appeals held that New Mexico can levy its gross receipts tax on non-Indian contractors for their work on the Mescalero Reservation under contsruction contracts with the Mescalero Apache Tribe or one of its agencies. The Court of Appeals enforced the state tax even though the construction was for a federally approved, sponsored and regulated economic development project of the Mescalero Apache Tribe,

even though the contractors were licensed Indian traders, and even though the economic burden of the tax fell on the tribe.

The lower court upheld the tax solely because its legal incidence was on the non-Indian contractors. Although this Court's recent rulings in *White Mountain Apache Tribe v. Bracker,* ..... U.S. ....., 100 S.Ct. 2578 (1980) and *Central Machinery Co. v. Arizona State Tax Comm'n,* ..... U.S. ....., 100 S.Ct. 2592 (1980) were called to the Tenth Circuit's attention, it ignored their teachings. It did not give any meaningful consideration to the twin barriers of federal preemption and non-interference with tribal self-government, nor did it make "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2584.

The Court of Appeals "has decided a federal question in a way in conflict with applicable decisions of this Court," justifying a grant of certiorari. Sup. Ct. R. 17.1(c). Indeed, the demonstrable conflict between the reasoning and result below and this Court's most recent Indian taxation decisions "is, of course, one of the strongest possible grounds for securing the issuance of a writ of certiorari." R. Stern & E. Gressman, *Supreme Court Practice,* 273 (5th ed. 1978). The error is so clear as to warrant summary reversal.

II.

INTEREST OF AMICUS CURIAE

Amicus NFPI is a wholly-owned and controlled entity of the Navajo Tribe, which, like the Fort Apache Timber Company in last term's *White Mountain Apache Tribe* case, was formed under the aegis of the United States Bureau of Indian Affairs to manage, harvest, process and sell on a sustained-yield basis the timber grown on the Navajo Reservation. NFPI was organized to meet the goals of the

Navajo-Hopi Rehabilitation Act of 1950 (25 U.S.C. §631 *et seq.*), to "encourage and further the social, economic and educational level of the Navajos" and "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities." 28 U.S.C. §631; NFPI Summary Plan of Operation, art. I; *see Secretary of Labor v. Navajo Forest Products Industries,* OSHRC Docket No. 76-5013 (Sept. 30, 1980).

Since its inception in 1959, NFPI has created over 600 industrial jobs for Navajos, developed a sustained-yield harvesting program for the Navajo Reservation's large timber stands, built many miles of roads giving Navajos living in remote areas access for the first time to schools, medical facilities and trading posts, generated $97.6 million of lumber sales for the tribe, created a sawmill town and market center on the reservation, and improved the lot of the Navajos in many other ways. *See Secretary of Labor v. Navajo Forest Products Industries, supra,* slip op., 5-6.

In order to expand its manufacturing capacity, NFPI determined in 1971 to build a modern particleboard plant at Navajo, New Mexico, wholly within the Navajo Reservation. Lacking the necessary skills itself, NFPI engaged non-Indian architects, engineers and contractors to enter the reservation and design and build the particleboard plant. The plant was completed in 1976 at a total cost of $10-11 million. Since its completion the plant has manufactured particleboard for NFPI. Every step in the development of the particleboard plant, from initial concept to ultimate completion, was approved, supervised and funded by the United States Economic Development Administration in fulfillment of the long-standing federal policy of promoting the economic self-sufficiency of the Indians.

Like the Mescalero Apache Tribe and like the tribal entities in *White Mountain Apache Tribe* and *Central Machinery Co.*, NFPI was required to hold its non-Indian contractors harmless from the gross receipts tax New Mexico has assessed against those contractors. The economic burden of the tax therefore falls fully on NFPI and the Navajo Tribe. NFPI has commenced an action seeking a declaration that New Mexico cannot impose its gross receipts tax on the contractors who built NFPI's particleboard plant. *Navajo Forest Products Industries v. O'Cheskey,* No. 78-432 P (D.N.M.). NFPI's action has been stayed pending final resolution of the Mescalero Apache Tribe's case.

Except for the fact that NFPI's contractors supplied specialized skills and services not readily available elsewhere and had no contacts with New Mexico other than building NFPI's plant, the facts in NFPI's case closely parallel the facts in this case. The outcome here will likely control the result in NFPI's suit.

III.

ARGUMENT

A. The Need for Conformity to this Court's Decisions

It is essential to the function of the federal judicial system that this Court's decisions be the final authority on all matters to which this Court has spoken. Therefore, this Court has announced that where there is a direct conflict between the decision of a court of appeals and decisions of this Court, grounds for certiorari exist, and certiorari is commonly granted. *See Henderson v. Kibbe,* 431 U.S. 145, 152 (1977), where certiorari was granted "[b]ecause the Court of Appeals decision appeared to conflict with this Court's holding in *Cupp v. Naughton,* 414 U.S. 141." Such a case calls for summary reversal, *Helvering v. Wiese,* 292 U.S. 614 (1934), and may be disposed of without argument or written opinion. *S.E.C. v. Otis & Co.,* 338 U.S. 843

(1949); *F.C.C. v. Broadcasting Service Organization, Inc.*, 337 U.S. 901 (1949).

That is the situation here. Summary reversal is appropriate.

B. The Court of Appeals' Opinion Directly Conflicts with This Court's Decisions in White Mountain Apache Tribe and Central Machinery Co.

1. THE COURT OF APPEALS RELIED SOLELY ON THE TAX'S LEGAL INCIDENCE, IGNORING FEDERAL PREEMPTION AND TRIBAL SELF-GOVERNMENT.

The Court of Appeals' decision is premised on the notion that "the initial incidence of the [New Mexico gross receipts] tax must be the determinative factor. It is the only significant matter for our consideration." Pet., 6a-7a. According to the Court of Appeals, to resolve this case, it only needed to determine whether the legal incidence of New Mexico's tax was on the non-Indian contractors or on the Indian tribe with which they contracted. Pet., 4a-5a, 6a-7a, 8a, 10a-11a.

The Court of Appeals easily answered that narrow question. In *United States v. State of New Mexico,* 581 F.2d 803 (10th Cir. 1978), the same court had determined that the legal incidence of the same tax was on nongovernmental contractors, not the federal government for which they worked. Consequently, the court had there concluded that federal law did not preempt imposition of the tax on contractors working for the federal government. According to the Court of Appeals, that holding foreclosed the only relevant question in this case:

> The incidence of this tax cannot be different here just because Indians are involved. The tax is the same, and it is clearly on the contractor. The Indians here are in no different position than was the federal government in *United States v. State of N.M.,* 581 F.2d 803 (10th Cir.) Pet., 5a.

The tribe's agreements to indemnify its contractors for the gross receipts tax did not change the picture in the Tenth Circuit's view. Those agreements had been entered into, said the Court of Appeals, at the tribe's own election to make "it *appear* that the incidence of the tax was on the Tribe when it was not." Pet., 6a; emphasis in original.[1] Though recognizing that "there is at least an initial economic impact on the Tribe since the contractor can pass the tax along," the Court of Appeals refused to venture into the "morass of indirect burdens," holding them to be "of no consequence." Pet., 8a. Moreover, the lower court found that the uncontroverted, indirect burden of the tax did not interfere with the tribe's internal affairs because the tax was non-discriminatory[2] and because it only affected the tribe's money. Pet., 10a-11a.

Having quoted this Court's holding that "state laws may be applied [on the reservation] unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law," *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973), the Court of Appeals summarily dismissed the tribe's federal preemption claim:

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1. Identical agreements to reimburse the contractor or seller for state taxes were involved in both *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2582 and *Central Machinery Co. v. Arizona State Tax Comm'n, supra,* 100 S.Ct. at 2594, n. 2. In neither case did this Court disregard the real economic burden those taxes imposed on the tribes because the tribes voluntarily made those agreements.

2. The Tenth Circuit's reliance on the nondiscriminatory nature of the gross receipts tax is misplaced. All the state taxes this Court has reviewed in recent years, including those at issue in *White Mountain Apache Tribe* and *Central Machinery Co.,* were nondiscriminatory. The nondiscriminatory nature of the taxes in those cases did not save them from federal preemption; indeed, the point has not been treated as a significant consideration in any of this Court's recent decisions.

> This clearly states again the position of, or application of state laws on the Mescalero Reservation. This leaves no room for any doctrine of preemption. The relationship of the parties is defined. The parties are defined, and are only the state and Congress. Pet., 8a.

The Court of Appeals also found it unnecessary to examine the state's interest in enforcing its tax law. According to the lower court, it was enough that the contractors and the tribe presumably derived some unspecified benefit from New Mexico's laws and governmental activities. Pet., 6a. Nor, in the lower court's view, was the "fact that some of the services, and most of them, were performed on Indian land . . . a factor to be considered . . . ." Pet., 8a.

Finally, the Court of Appeals dismissed *Warren Trading Post v. Tax Comm'n,* 380 U.S. 685 (1965) because there the taxed trader was an entity long licensed and regulated as an Indian trader, a permanent enterprise on the reservation. Pet., 9a. By contrast, the Court of Appeals found that the "licensing in the case before us was, of course, a pretext or a fiction and in no way was comparable to the licensing in *Warren. See* the trial court finding of fact as to the licensing." *Ibid.*[3]

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3. The trial court did not find that the Indian trader licenses were a pretext or fiction. Instead, it held that the licenses had been improperly issued because the Indian trader statutes were not intended to cover commercial transactions "conducted by experienced, knowledgeable people on a highly sophisticated level," but only transactions "where the Indian could be at the mercy of the white man in the absence of federal protection." *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063, 1068 (D.N.M. 1977). In *Central Machinery Co.,* this Court noted no such "helpless Indian" limitation of the Indian trader statutes. To the contrary it found those statutes applied to a clearly commercial sale of 11 tractors to an Indian tribal enterprise, which was not shown to lack expertise or bargaining power.

2. THIS COURT HAS REJECTED THE LEGAL INCIDENCE TEST AND REQUIRED A PARTICULARIZED INQUIRY INTO STATE, FEDERAL, AND TRIBAL INTERESTS WHICH THE COURT OF APPEALS DID NOT PERFORM.

At each step of the way, the Court of Appeals' opinion conflicts with the reasoning, principles and tests this Court most recently expounded in *White Mountain Apache Tribe v. Bracker,* ..... U.S. ....., 100 S.Ct. 2578 (1980) and *Central Machinery Co. v. Arizona State Tax Comm'n,* .... U.S. ...., 100 S.Ct. 2592 (1980).

First, in Indian tax cases, this Court has discarded the legal incidence test which the Tenth Circuit found crucial. In both *White Mountain Apache Tribe* and *Central Machinery Co.,* the legal incidence of the tax was on the non-Indian contractor or seller. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2581-2582 & n. 5; *Central Machinery Co. v. Arizona State Tax Comm'n, supra,* 100 S.Ct. at 2595 n. 3. Yet, no opinion in either case suggested that that fact was significant, let alone crucial, in assessing the taxes' validity. To the contrary, the demise of the legal incidence test merited only a footnote:

> Nor may appellee distinguish the present case from *Warren Trading Post, supra,* by contending that the tax at issue in this case falls upon the seller of goods and not the buyer because it is a tax on the privilege of doing business in Arizona rather than a sales tax. . . . [R]egardless of the label placed upon this tax, its imposition as to on-reservation sales to Indians could "disturb and disarrange the statutory plan Congress set up in order to protect Indians . . . ." *Central Machinery Co. v. Arizona State Tax Comm'n, supra,* 100 S.Ct. at 2595, n. 3.

Second, this Court specifically warned against the simple-minded application of federal-state preemption principles to Indian law questions:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2583.

The Tenth Circuit's unthinking reliance on its own decision in *United States v. State of New Mexico, supra,* directly contravenes this warning.

Third, this Court reaffirmed the controlling significance of the two distinct but interrelated tests of federal pre-emption and noninfringement of tribal self-government. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2583. As this Court said:

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. [Citation.] As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. [Citation.] Fn. omitted; *id.* at 2583-2584.

Where a state attempts to tax non-Indians' activities on the reservation, the vindication of these policies has required "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 2584.

The Tenth Circuit failed to make that particularized inquiry in this case. Though recognizing that the New Mexico tax posed an indirect burden on the Mescalero Apache Tribe and its federally sponsored and regulated economic development project, the Court of Appeals found that burden legally irrelevant because it was indirect and involved only the loss of money.[4] Pet., 8a, 10a-11a. The Tenth Circuit did not even mention the federal interests in tribal self-government and economic development at stake here. Nor did the lower court examine New Mexico's interest beyond asserting that both the contractors and the Mescaleros derived some unspecified benefits from the state. Pet., 6a.

In contrast to the majority opinion below, Circuit Judge McKay's dissent made the particularized inquiry enjoined by this Court, arriving at the unassailable conclusion that New Mexico's tax is preempted.

Fourth, the Court of Appeals erroneously held that the fact that the contractors' services were performed on the Mescalero Reservation was "not a factor to be considered." Pet., 8a. Yet, according to this Court:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded permissible limits. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. 2587.

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4. In *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2586-2587, this Court held the monetary burden of similar state taxation inconsistent with the federal policy of encouraging tribes to revitalize their self-government and assume control of their economic and business affairs.

Finally, this Court's decision in *Central Machinery Co., supra,* destroys the basis on which the Tenth Circuit tried to distinguish *Warren Trading Post, supra.* In *Central Machinery Co.,* this Court held that the Indian trader statutes and regulations preempted state taxation of a seller who was neither licensed as an Indian trader nor located on the reservation. *A fortiori, Warren Trading Post's* rationale should apply to the contractors in this case who sold and performed their services on the reservation and who were licensed as Indian traders. *See* n. 3, *supra.*

In short, from beginning to end the Tenth Circuit's reasoning conflicts with the principles this Court reaffirmed last term. Not surprisingly, the Court of Appeals' conclusion is likewise at odds with the holdings in *White Mountain Apache Tribe, supra,* and *Central Machinery Co., supra,* as amply demonstrated in Judge McKay's dissent below and in the petition for certiorari.

3. ON REHEARING, THE COURT OF APPEALS BRUSHED ASIDE THIS COURT'S RECENT DECISIONS WITHOUT ANALYSIS.

Though given an opportunity on rehearing to correct these errors in light of this Court's recent rulings, the Court of Appeals summarily dismissed *White Mountain Apache Tribe, supra,* and *Central Machinery Co., supra,* as adding nothing to the law and requiring no change in the Court of Appeals' prior opinion.

According to the Court of Appeals, this case is not a "sale of 'things' case" and is therefore not controlled by the Indian trader statutes or *Warren Trading Post.* For that reason, the Court of Appeals concluded that "*Central Machinery* adds no new elements or factors not already considered." Pet., 49a.

In fact, as already shown, *Central Machinery Co.* destroys the sole ground on which the Tenth Circuit distin-

guished *Warren Trading Post* in its main opinion. *See* p. 11, *supra*. The sale-of-things distinction which the Court of Appeals found for the first time on rehearing is equally erroneous. The Indian trader statutes regulate trade and traders with the Indians. 25 U.S.C. §§261-264. Though those statutes mention sale of goods, they do not limit the regulation of traders to those who sell tangible assets—things—as opposed to services. To the contrary, the Bureau of Indian Affairs, charged with enforcement of the Indian trader laws, has determined that the contractors in this case fall within the regulatory reach of those statutes and issued them licenses accordingly. *See Mescalero Apache Tribe v. O'Cheskey, supra,* 439 F.Supp. at 1068.

The Court of Appeals handled *White Mountain Apache Tribe* even less convincingly. At the end of a string of quotations from that decision, the lower court cited this Court's statement that the state taxes were not preempted solely because they imposed an economic burden on the tribe, but because the comprehensive federal regulatory scheme left no room for additional state law burdens. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2587-2588, n. 15. "Under [this] footnote," said the Court of Appeals, "the burden argument is the same as preemption." Pet., 50a-51a. That sentence was all the lower court said about why *White Mountain Apache Tribe* does not require a different result here.

Neither on rehearing nor in its main opinion did the Court of Appeals examine the federal regulatory scheme under which the Mescalero Apache Tribe developed the projects for which New Mexico assessed taxes. It did not consider what impact imposition of the taxes would have on the federal regulatory purpose. It did not weigh the state's interest in imposing the tax. In short, the Tenth Circuit utterly ignored the teaching of *White Mountain*

Apache Tribe, failing to make the particularized inquiry that decision requires and relying instead on a discredited and oversimplified notion of the legal incidence of New Mexico's tax.

C. For Reasons of Public Policy, This Court Should Grant Certiorari and Summarily Reverse

NFPI and many other Indian tribal enterprises and tribes are located within the Tenth Circuit. They are entitled to have their legal claims determined on a uniform basis consistent with this Court's rulings.

The decision below will deny them that right. It is utterly inconsistent with the law as pronounced by this Court last term.

The Mescalero Apache Tribe has demonstrated in considerable detail the important federal policies and programs involved in its development of the Inn of the Mountain Gods complex. It has also shown that those policies and programs will be frustrated by imposition of New Mexico's tax. The same is true of NFPI's particleboard plant project. Many hundreds of other Indian business transactions, fostered by Congress to promote Indian economic development and self-government, have occurred or will occur within the Tenth Circuit. Unless certiorari is granted, they will all be controlled by the lower court's decision, which as shown is at odds with this Court's decisions.

In all material respects, this case is the same as *White Mountain Apache Tribe* and *Central Machinery Co.* While it is unfortunate that each term this Court must decide more Indian tribal claims of preemption from state taxes, fairness and justice, as well as the uniform administration of the laws, require that certiorari be granted here. However, since there can be no dispute about the issues or outcome, both of which are controlled by last term's decisions, we respectfully suggest that a plenary hearing is not required.

Certiorari should be granted, and the Court of Appeals' decision should be summarily reversed. See cases cited at pp. 4-5, *supra*.

IV.

CONCLUSION

For the above-stated reasons, this Court should issue its writ of certiorari to the Court of Appeals and summarily reverse the judgment below.

Respectfully submitted,

KURT W. MELCHIOR
One Embarcadero Center, 25th Floor
San Francisco, California 94111
Telephone: (415) 398-3344
Attorney for Amicus Curiae, Navajo Forest Products Industries, an Enterprise of the Navajo Tribe

Of Counsel:

JAN T. CHILTON
SEVERSON, WERSON, BERKE & MELCHIOR
One Embarcadero Center, 25th Floor
San Francisco, California 94111
Telephone: (415) 398-3344

GEORGE J. AHLMANN
AHLMANN & SIGLER
P. O. Box 1279
Navajo, New Mexico 87328
Telephone: (505) 777-2262